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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 621

BAYSIDE BUS CORPORATION,
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

TITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

EMANUEL HARRIS,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 621

BAYSIDE BUS CORPORATION,

vs.

Petitioner,

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of BAYSIDE BUS CORPORATION respectfully shows to this Court:

This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

On November 25th, 1942 an order was made by the said Circuit Court of Appeals affirming a judgment of the United States District Court for the Southern District of New York entered on June 11th, 1942 dismissing the complaint herein. A petition for rehearing in the said Circuit Court of Appeals was denied on November 25th, 1942.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, Act of February 13th, 1925.

Statement of Matters Involved.

The action arose out of contracts made by the respondent with the petitioner for the transportation of W.P.A. workers (R. 10, 60, 62).

It was provided by the said contracts that payment would be made by the respondent only for the exact number of passengers transported in accordance with all the terms of the contract at the prices quoted therein. It was further provided by the said contracts that the number of workers to be transported was not guaranteed but that the petitioner would be notified in advance of the number of passengers to be carried on each following day subject to a variance of ten per cent more or less although the petitioner's acceptance of notice by noon of the previous working day of a greater modification than ten per cent would be held binding and it was further provided that the petitioner would supply sufficient buses to conform to the schedules in the contracts and would also have available a reserve of ten per cent to meet contingencies (R. 11, 16, 60, 62).

Respondent breached the contracts in that it failed to furnish for transportation passengers within the ten per cent variance in numbers thereof permitted by the contracts. The extent of such variances in excess of ten per cent between the number of passengers petitioner was directed to prepare for and the number actually furnished by the respondent are set forth in the record (Plaintiff's Ex. 2, R. 60, 62, 64).

The prices fixed by the contracts for the transportation of such passengers are set forth in the record (R. 13, 60, 62).

The amounts agreed to be paid by respondent for transportation of passengers ordered but not furnished was the sum of $1633.21 on the first contract, $440.63 on the second contract, and $635.66 on the third contract, making a total of $2709.50, which is the amount sued for in this action (R. 3, 6, 8, 9).

The District Court dismissed the complaint at the end of the petitioner's (plaintiff's) case, on the ground that the exact number of passengers transported measured the obligation of the respondent to make payment, on the further ground that the preparation of vouchers by the petitioner on the basis of the number of passengers actually carried and the acceptance of payment in conformity with those vouchers were a satisfaction by the petitioner of the terms of the contract and that there was a failure to prove damages (R. 56).

The Circuit Court of Appeals in its opinion held that there was a breach of contract by reason of the failure of the respondent to give accurate notice of the number of passengers to be carried within the specified limit, thus reversing the District Court on the construction of the contracts (R. 91).

The Circuit Court of Appeals said nothing in its opinion with reference to the alleged satisfaction of the terms of the contracts by the petitioner by reason of the preparation of the vouchers aforesaid and the acceptance of payment thereon.

However, the Circuit Court of Appeals held that although petitioner was entitled to recover for any losses which it suffered from having to provide buses in accordance with the notice given by the respondent it could not allow recovery for the reason that any loss in connection with the shortages of passengers furnished would fall upon the petitioner's sub-contractors and not upon the petitioner (R. 91). Therefore, the Circuit Court of Appeals held that

petitioner had proved no loss and judgment was affirmed on the ground that no damages were proved (R. 93).

Questions Presented.

1. Were the relations of petitioner with its sub-contractors material to the right of petitioner to recover for respondent's breach of contract or was the amount of the petitioner's recovery affected thereby?

2. Has the proper measure of damages been applied by this Circuit Court of Appeals in determining the loss sustained by petitioner?

3. In view of the holding by the Circuit Court of Appeals contrary to the judgment of the District Court that respondent had breached the contracts, should not the Circuit Court of Appeals have remanded the cause to the District Court for the purpose of affording the petitioner an opportunity to prove its losses?

Reasons for Allowance of Writ.

The judgment of the Circuit Court of Appeals was contrary to the applicable decisions of this Court with respect to

a) the effect upon petitioner's recovery of its relations with its sub-contractors;

b) the measure of petitioner's damages;

c) the right of petitioner to prove its losses.

The petitioner therefore prays that a writ of certiorari may be allowed to review the judgment of the said Circuit Court of Appeals and that a writ may be issued to the Circuit Court of Appeals for the Second Circuit directing that

all the proceedings in this case may be forwarded to this Court for review.

Respectfully submitted,

BAYSIDE BUS CORPORATION,
By EMANUEL HARRIS,
Counsel for Petitioner.

Dated, New York, December —, 1942.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The performance by Petitioner of part of the work through subcontractors did not affect its right to recover for the respondent's breach of contract nor the amount of such recovery.

THE EVIDENCE AS TO THE SUBCONTRACTORS.

At the time of the bid invitation petitioner solicited information from various other bus operators (41). Petitioner's original arrangement with its subcontractors was to pay them $18 a day per bus. Anything that was realized over that amount petitioner was to retain (41). Out of the $18 a day certain deductions were to be made for expenses in the performance of the contract. Petitioner agreed to supply the subcontractors with fuel and oil at cost (42). Because the number of persons or quotas ordered by the government was at great variance with the actual number furnished, petitioner's president told the subcontractors that he could not pay them $18 a day, that he was doing everything that he could to adjust the issues and suggested that petitioner pay the subcontractors on the basis of the contract price for the number of persons they actually transported and that subsequently if petitioner recovered any additional money on account of the variance being greater than what the contract provided for petitioner would compensate the subcontractors for the difference to their satisfaction. The subcontractors agreed to this arrangement (44). On the original arrangement of $18 a day for the subcontractors, petitioner had to stand the deductions made for late arrivals, as well as for a maintenance man, repair man, supervision and accounting (44, 45).

On cross-examination the president of petitioner testified that he never paid the subcontractors $18 a day, but that he paid them for the actual number of passengers carried by them (48). Petitioner reimbursed some of the subcontractors and had a definite arrangement with them for payment in the event petitioner was successful in its suit (48, 49). The job went bad within the first three or four days from the date it started. Buses were standing around and men were standing around (49). At no time did petitioner pay $18 a day to the subcontractors (49). The number of buses furnished by the subcontractors and by the petitioner during the periods of the three contracts is set forth on page 50 of the record, as well as in Plaintiff's Exhibit 3, which also gives the number of passengers carried by petitioner and by the subcontractors. Petitioner's arrangement with the subcontractors with respect to reimbursement to the subcontractors in the event petitioner was successful in this suit was entered into within the first two weeks (52). The subcontractors depended on the good faith of petitioner to pay them (52).

The case having been dismissed at the end of petitioner's (plaintiff's) case, all the evidence presented by petitioner is accepted as true and every inference that may be reasonably drawn therefrom is considered favorably to petitioner.

Lumbra v. *United States,* 290 U. S. 551.

Myers v. *American Wool Works,* 114 F. (2d) 252, cert. den. 313 U. S. 563.

Neilsen v. *Richman,* 114 F. (2d) 343, cert. den. 311 U. S. 705.

In *Hunt* v. *United States,* 257 U. S. 125, where a principal contractor had sublet an entire contract for the transportation of mail to a subcontractor who performed all the services required, this Court reversed a judgment of

the Court of Claims in which that Court dismissed a petition by the principal contractor to recover for services rendered under the contract on the ground that the principal contractor had no interest in the subject matter of the petition.

This Court said (p. 128):

> "The Government did not have and did not by implication recognize any contractual relations whatever with Travis (the subcontractor) and if he had failed in performing it would not have had any right of action against him for the subletting of such contract was forbidden by the statute except with the consent in writing of the Postmaster General which was never given. (C. 107, 20 Stat. 62, Section 2). Weighel (the principal contractor) was the only person legally bound to perform the original contract; it was from him that the Government demanded the extra services and under the facts found by the lower court the obligation to pay for that service was to him whether he performed it personally or through another."

In *Pneumatic G. C. & P. Co.* v. *United States*, 36 Ct. Cl. 71, 88, where subcontracts were referred to as the "common incidents" of building and other similar enterprises, it was held that where plaintiff's contract was broken by fault of the government, the government should answer without waiting for plaintiff to first pay the damages sustained by the subcontractors since these damages would not have been caused had the government kept faith with the principal contractor.

In *Stout* v. *United States*, 27 Ct. Cl. 385, it was held that the fact that a subcontractor was employed by the claimant and was to receive the same price which the contractor was to receive did not affect the recovery by the contractor nor the amount of such recovery, and the Court there said, page 387:

"A contractor has a right to make subcontracts. In the nature of things he must make them for he must hire labor, buy materials, procure transportation and fulfill through the agency of others the duties imposed upon him by his undertaking. He must not attempt to transfer his responsibility to the government; the government having selected him as the one with whom they wish to deal, he is not free to change that position. But he has a perfect right to fulfill his contract duties in the business manner which best pleases him providing he retain his personal responsibility and achieve the required result.

"The contract or understandings with the Maine Granite or the Hurricane Co. do not affect the recovery herein; these companies had and have no relations with defendants; they were plaintiff's instruments in fulfilling the contract; if they have sustained any loss, they must look to plaintiff for relief. A subcontract exactly like the one made with the Hurricane Co. appears in Masterton *v.* The Mayor (7 Hill., N. Y. 61) and as to it, Chief Justice Nelson said:

" 'Indeed I am unable to comprehend how these can be taken into account or become the subject matter of consideration at all in settling the amount of damages to be recovered for a breach of the principal contract' ".

And in *McNally* v. *State,* 170 Misc. 194, the New York Supreme Court relying on the decision of this Court in *Hunt* v. *United States,* 257 U. S. 125, *supra,* said:

"Sound reasoning extends to the contractor the right to recover from its defaulting promisor the amount of damages for which it would be liable to its subcontractor, even though it has not actually paid them."

II.

The measure of petitioner's damages was the amount agreed to be paid by the respondent for the transportation of the passengers ordered but not furnished.

It was found by the Trial Court that the petitioner duly performed all the terms of the contract on its part (R. 81).

In such case the amount of compensation agreed to be paid by the respondent is conclusive on the measure of the amount of recovery for the performance of the contract.

So. Pac. Ry. v. *United States*, 53 Ct. Cl. 332.

In an action for breach of contract to furnish trucking it has been held that the measure of damages is the contract price less the cost of making trips not required by reason of defendant's failure to furnish the freight for trucking.

Matson v. *Bradbury*, 10 Pac. 2d 376, 40 Ariz. 140.

A similar rule has been applied in actions for breach of contract for failure to furnish freight by a charterer.

Thebideau v. *Cairns*, 171 Fed. 233;

Dalbeattie S. S. Co. v. *Cano*, 59 Fed. 159;

Jordan v. *Eaton*, Fed. Cases #7520.

III.

The Circuit Court of Appeals having ruled that there was a breach of contract by the respondent should have remanded the cause for the purpose of permitting petitioner to prove its losses.

The Circuit Court of Appeals did not adopt the petitioner's contention that the contract price was the measure of damages. It should then have given petitioner an opportunity to prove its losses as damages.

A similar situation was presented in this Court in *Bulkley* v. *United States*, 86 U. S. 37. This Court there held that under the terms of the contract in that case the Government had unlimited discretion to change the notices as to the amount of freight to be furnished for transportation and that because of such unlimited discretion the Government had committed no breach of contract in failing to furnish freight as ordered. Nevertheless, this Court held that the plaintiff was entitled to recover for his loss of time,

trouble and expense in making ready to meet the requirements of the notices, although plaintiff might not recover his profits since there was no breach of contract. Notwithstanding the insistence of plaintiff in that case upon his profits both upon the trial and upon the appeal to this Court, the Supreme Court afforded him an opportunity upon a further trial to prove his losses.

Surely in this case where the Circuit Court of Appeals has on the facts actually found a breach of contract by the defendant, petitioner should have been given an opportunity to show the losses sustained by it resulting from the defendant's breach.

In the *Bulkley* case, supra, this Court said:

> "In making ready to meet the requirements of the notice, Bulkley was subjected to the loss of time, trouble and expense. He is entitled to be paid accordingly. Such is an implication of the contract and what is implied in a contract, deed, will or statute, is as effectual as what is expressed."

The obligation of the respondent in the instant case to pay for the passengers ordered but not furnished was as much a part of the contracts as the express promise to pay for passengers carried.

Conclusion.

Upon the grounds assigned, the petition for a writ of certiorari should be granted.

Respectfully submitted,

EMANUEL HARRIS,
Counsel for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 621

BAYSIDE BUS CORPORATION

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court of the United States for the Southern District of New York (R. 77–81), entered without opinion, are unreported. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 90–93) is not yet officially reported.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Second Circuit (R.

100) was entered on November 25, 1942. A petition for rehearing (R. 94–98) was denied November 25, 1942 (R. 99). The petition for a writ of certiorari was filed on January 4, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The questions presented are:

1. Whether the United States was guilty of breaching the contracts entered into with the petitioner whereby the ~~respondent~~ Petitioner agreed to furnish transportation to certain federal workers. This question, in turn, depends on whether the United States guaranteed that a specified number of workers were to be transported or whether the United States contracted to pay only for the number of workers which were in fact transported.

2. Whether, if the contracts were breached, any damage resulted for which petitioner is entitled to recover.

STATEMENT

In January and February 1939, the United States entered into three contracts with petitioner for the transportation by bus of W. P. A. workers between St. George, Staten Island, New York, and certain designated zones in Staten Island, during

the months of January, February, and March, 1939, at specified rates per capita for one way trips, the rates varying with the different zones (R. 2–8, 10–13, 28, 60, 62).

Each contract (known as "purchase order") provided that (R. 11, 60, 62):

> Payment will be made only for the exact number of passengers transported in accordance with all the terms of the contract at the price quoted herein.

Each contract included a table showing the "Estimated Daily Average Number of Passengers" for each zone (R. 13, 60, 62) and the statement that (R. 16, 60, 62):

> The aforesaid number of workers is approximate only and cannot be guaranteed. However, successful vendor will be notified by 12:00 noon of the number of passengers to be carried the following day, subject to a variance of 10% more or less, although vendor's acceptance of notice by noon of the previous working day of a greater modification than 10% will be held binding.
>
> Vendor will supply sufficient buses to conform to schedules hereinbefore mentioned, and will also have available a reserve of 10% to meet contingencies.

Petitioner owned five buses "licensed" for the job, and used "three or four" of these buses (R. 49). Most of the buses used were furnished by

subcontractors,[1] who were procured by petitioner to assist in the performance of his undertaking at an originally stipulated compensation of $18 per day per bus, subject to certain deductions for funds laid out by petitioner principally for maintenance and the salaries of two supervisors (R. 41, 43, 49–50).

On January 10, 1939, several days after petitioner began performance, petitioner wrote to the contracting officer, complaining that the number of passengers carried was almost 25% lower than the daily estimates furnished by W. P. A. and asking whether some arrangement could be made to compensate the "carrier" on a "service" or "stand-by" basis when equipment "put in readiness" pursuant to the W. P. A. estimates was not utilized (R. 29, 65–69). Subsequently, during the eight weeks succeeding the inception of performance, petitioner discussed the matter with a number of Treasury and W. P. A. officials, in order to try "to find some equitable solution"; it did not, however, see either the contracting officer, or the assistant who signed the "purchase orders" on

[1] The following chart shows the number of buses supplied by petitioner and by the subcontractors during each of the two-week periods covered by the purchase orders:

	Petitioner	*Subcontractors*
January 1–15	4	25
January 16–31	4	12
February 1–15	4	8
February 16–28	4	9
March 1–15	3	9
March 16–31	4	9

his behalf (R. 29–33). The Government officials advised petitioner that it would be paid only for passengers actually carried (R. 30–31, 32, 40–41), and petitioner was furnished a form on which to bill the Government for such passengers (R. 33, 34–35). Thereafter petitioner submitted invoices covering only the number of passengers carried (R. 35, 37, 38, 70–75), and never invoiced the Government or made any written demand for any additional payments (R. 40, 45–46). Petitioner's first oral demand for additional payment was made in February 1939 (R. 40).

When it appeared that the number of passengers carried varied more than 10% under the W. P. A. estimates, petitioner, within the first two weeks of January 1939, effected a modification of its arrangements with the subcontractors, whereby they agreed to accept, instead of $18 per day per bus, per capita payments for passengers actually carried at the rates specified in the "purchase orders" (R. 42–44).[2] Petitioner promised the subcontractors that he would compensate them if he subsequently recovered any additional funds from the Government (R. 43). Petitioner never paid any of the subcontractors the $18 per day, but paid them all at the "purchase order" rates, for the actual number of

[2] Petitioner testified that all of its contracts with the subcontractors were oral (R. 46–49), and submitted no documents bearing on its relations with the subcontractors.

passengers they carried, subject to pro rata deductions for "exactly the cost" petitioner sustained for storage, supervisors' salaries and social security and unemployment insurance taxes (R. 44, 46, 48, 49, 52, 53, 76). Twice during January 1939, buses prepared for use and supplied by subcontractors were returned to the garages (R. 53).[3]

Petitioner claims as damages the per capita rate for the variance in the number of passengers actually carried and the number represented by 90% of the estimates furnished by W. P. A. (R. 25, 91). The District Court dismissed on the grounds that respondent was obligated to pay only for passengers actually transported and had fully performed its contract; that there was an accord and satisfaction between petitioner and respondent by virtue of petitioner's submission of invoices only for the number of passengers actually carried, without protest or reservation of any claim for damages; and that petitioner had suffered no damage by reason of any alleged breach of the contracts. The court below affirmed the judgment, holding that while there was a breach of contract, any resulting loss was borne by the subcontractors, and accordingly that since petitioner had proved no damages, its complaint had been properly dismissed (R. 90–93).[4]

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[3] Only one witness, its president, was offered by petitioner.

[4] One judge concurred, agreeing with the view of the District Court that there was no breach of contract (R. 93).

ARGUMENT

No question of substantial or general importance is involved. The rules concerning the construction of contracts are not in dispute and there is no conflict of decisions; the only issues are whether under the particular circumstances the petitioner established a breach of contract entitling it to recover.[5] In any event, petitioner's contentions are erroneous.

1. Respondent committed no breach of contract. The contracts provide that "payment will be made only for the exact number of passengers transported in accordance with all the terms of the contract at the price quoted herein" (R. 11). This unequivocal statement of the obligation assumed by the Government was not modified by the subsequent provisions regarding notice, which themselves embody an explicit disavowal of any guarantee of the number of workers to be transported (R. 16). Even in the absence of such an express disclaimer, the effect of the notice provisions would have been merely "to signify a purpose on the part of the government" without binding the Government to pay for any minimum amount of transportation. *Bulkley* v. *United States,* 19 Wall. 37, 40. *Cf. Lobenstein* v. *United States,*

[5] The dismissal of a complaint does not warrant reversal where only nominal damages could be recovered and no costs would follow. *United States* v. *Withers,* 130 Fed. 696, 698 (C. C. A. 2).

91 U. S. 324, 330; *Brawley* v. *United States*, 96 U. S. 168, 170, 174.

That this was the purport of the agreement is reenforced by the practical interpretation given it by the parties, which is entitled to great weight. *Insurance Co.* v. *Dutcher*, 95 U. S. 269, 273; *Merriam* v. *United States*, 107 U. S. 437, 441, 444. Petitioner's conduct clearly indicates its understanding that the contract imposed no burden upon the Government beyond the obligation to pay for passengers actually transported.[6]

Further, throughout the life of the agreement petitioner invoiced the Treasury Department only for the passengers actually carried, for which it was paid (R. 33, 35, 38); petitioner did not at any time make a written demand or submit invoices for payment on account of passengers which it was prepared to, but did not in fact, transport (R. 45, 46). There is no evidence that petitioner ever protested or reserved any claim for

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[6] One week after the execution of the first contract, petitioner wrote to the contracting officer, complaining that the that the actual number of passengers transported did not come within ninety per cent of the daily estimates received from W. P. A. and asking (R. 68):

> * * * Cannot some arrangement be made whereby the "carrier" is compensated either on a "service" or "stand-by" basis when equipment is put in readiness on the basis of an estimate submitted by the Works Progress Administration and then is not used? * * *

damages concerning the matters alleged in its complaint. The interpretation petitioner now puts upon the contract is an afterthought, and is not the interpretation put upon it by the parties when it was executed. *Cf. Merriam* v. *United States,* 107 U. S. 437, 444; see *Chas. Nelson Co.* v. *United States,* 56 C. Cls. 448, 458, *affirmed,* 261 U. S. 17, 23, 24.

2. Even assuming that respondent committed a breach of the contracts to the extent that the passengers carried fell below 90% of the W. P. A. estimates, the judgment below was correct. Petitioner proved neither actual damage nor loss of profits, the only possible items of recovery for the alleged breaches. *Cf. United States* v. *Behan,* 110 U. S. 338, 344–345. It did not seek to prove any out-of-pocket damage on its own part.[7] The

[7] Petitioner's president testified that it supplied at its own expense a repair man to service the buses and inspect them for conformity with the rules of the Transit Commission, and also "accounting" services and his own supervision (R. 44–45); in addition, that during January and February, petitioner stood the contract penalty—i. e., no payment—for late arrivals (R. 16–17, 51). However, no effort was made to show the amount to which this came or whether these expenses would have followed even in the absence of the alleged breaches. Petitioner is not entitled to have the cause remanded to allow it to prove matters which it made no effort to prove at the trial. *Cf. United States* v. *Rodiek,* 120 F. (2d) 760, 762 (C. C. A. 2), *affirmed,* 315 U. S. 783, rehearing denied, 316 U. S. 707; *Coghlan* v. *South Carolina R. R.,* 142 U. S. 101; *Keator Lumber Co.* v. *Thompson,* 144 U. S. 434.

record indicates that the four buses supplied by petitioner itself for use on the job were all steadily employed except for the first two weeks in March, when three were used, and is silent as to the reason for this variation. In any event, taking into account the number of passengers who were carried and petitioner's arrangement with the subcontractors, any failure on its part to make full use of its own buses was voluntary. Not less than twelve buses were required in any of the two-week periods during the life of the undertaking and petitioner had only five "licensed" for the job.

The measure of profits for performance offered, but not rendered, is "the difference between the cost of doing the work and what (petitioner) was to receive for it". *United States* v. *Behan,* 110 U. S. 338, 345. Petitioner concedes that it made no attempt to show the profits, if any, which it would have made had the estimates been accurate and had the sub-contractors been paid on the original basis (R. 97–98). Further, under the facts at bar petitioner could scarcely show a loss of profit. In the first two weeks of its undertaking, before it could have known how accurate the future estimates would be, petitioner chose to protect itself against the risk of loss by rearranging its basis of dealing with the subcontractors in preference to proceeding on the original basis in anticipation

of ultimate recovery from the Government. By so doing petitioner disabled itself from realizing any profits on the passengers carried in the subcontractors' buses.

The offer of proof as to losses suffered by the subcontractors on account of the alleged breaches (R. 53–55), was properly excluded by the District Court, since there was no showing that petitioner was obliged to, or did in fact, reimburse the subcontractors.[8] *Cf. City of New York* v. *Selden,* 255 Fed. 317 (C. C. A. 2); *United States* v. *Cowden Mfg. Co.,* 312 U. S. 34. To permit petitioner to recover for the losses of the subcontractors would subject the United States to liability to complete strangers with whom it had never contracted and who could not themselves have sued the United States. *Cf. Merritt* v. *United States,* 267 U. S. 338, 340.

In the circumstances, petitioner has failed to prove that it suffered any damage in consequence of the alleged breaches of contract, whatever the losses of the subcontractors may have been, and is thus not entitled to any recovery. *Cf. City of New York* v. *Selden,* 255 Fed. 317 (C. C. A. 2); *Degnon Contracting Co.* v. *City of New York,* 235 N. Y. 481.

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[8] As the court below concluded (R. 92), there is no proof that the petitioner was ever bound to order buses from the subcontractors, or the latter to supply them, the record suggesting instead a series of offers by the former, accepted from time to time by the latter.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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